IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 348.

THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONER.

PAUL M. NIEBELL,
C. MAURICE WEIDEMEYER,
W. W. PEYOR,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

CITATIONS.

CASES:

ACTS AND RESOLUTIONS:

TREATIES:

MISCELLANEOUS:

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Some of the contentions of respondent need comment on our part, and we therefore submit our views on them herein for the consideration of the Court.

Item I.

The respondent states (Res. Br. 13-14):

"To this claim the Government interposes three defenses: (a) that the diversion was authorized by the Resolution of February 22, 1862, and by the Indian appropriation acts for the fiscal years 1863, 1864, 1865, and 1866; (b) that the diversion was ratified by the treaty of March 21, 1866, 14 Stat. 755, 759; and (c) that,

if these defenses are not sustained, the amount expended in feeding and clothing loyal Seminole refugees must be allowed as a gratuity offset under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596."

We will answer these contentions below.

Respondent's Contention (a).

The respondent contends (Res. Br. 17) "that there had been no breach of the treaty prior to the war," because "the treaty contained no requirement that the money was to be spent within the year." The respondent here overlooks the wording of the treaty that these items are to be provided "*annually* for ten years." While the treaty provides that the President direct the manner in which the annual sums are to be applied to these objects, yet it does not permit him to alter the *time* within which the treaty expressly directs this obligation to be fulfilled. The respondent admits (Res. Br. 16) that but $3,239.08 of the $36,000 appropriated up to June 30, 1862 was disbursed for these treaty purposes, and clearly the respondent had violated its obligation to petitioner long before the Civil War began.

The Resolution of February 22, 1862, 12 Stat. 614, relied upon by respondent, was superseded by the Act of July 5, 1862, c. 135, 12 Stat. 512, 528. In our initial brief we have shown that President Lincoln refused to put in effect a punitive measure against one of these tribes, and withheld judgment in the matter (Pet. Br. 15), and therefore the act of July 5, 1862 never became effective.

When the Civil War began the Federal troops were withdrawn from Indian Territory and it was overrun by Southern troops. The Seminole Nation was divided in its sympathies and a large portion of them remained loyal to the Union and were driven into Kansas, where their able bodied men enlisted and served in the Union Army (Pet. Br. 16-17).

Should the Resolution of February 22, 1862 and the Act of July 5, 1862 be held to be effective, we submit that then they should be construed as authorizing Seminole moneys

to be disbursed for the Seminole refugees only, and not for Indians of other tribes. As heretofore pointed out (Pet. Br. 18), the record shows that but $31,599.68 of a total of $249,731.88 of Seminole moneys thus diverted were disbursed for Seminole Indians (R. 22). Surely respondent cannot properly say that it is relieved of the duty to fulfill this treaty obligation because Seminole moneys were disbursed under the Act of July 5, 1862, and other similar acts, for Indians other than Seminoles.

Article 9 of the Treaty of March 21, 1866, 14 Stat. 755, reaffirmed all prior treaty stipulations and the United States thereafter should have complied with its treaty promises.

Respondent's Contention (b).

We submit that respondent has not answered the contention of petitioner that the release in Article 8 of the Treaty of March 21, 1866 does not affect this claim, because the Seminole Nation ratified only such diversions as were made from the *funds of the Seminole Nation*, and these objects for which we claim were to be furnished from the *funds of the United States*.

Under the Treaty of August 7, 1856, trust funds were established in the United States Treasury to the credit of the Seminole Nation, the annual interest thereon at 5 per cent was to be disbursed per capita to the members of the tribe. These were the Seminole *funds* affected by the release, and but $31,599.68 of the $249,731.88 thus diverted was disbursed for Seminole refugees. However, the treaty of 1856 required the United States to disburse annually certain of its own moneys for *objects* therein specified—for schools, agricultural assistance, and smiths and smith shops. Thus there is a distinction between annuities which were interest payments due on the "funds of the Seminole Nation," and payments from funds of the United States required to be disbursed for specified treaty objects.

A large amount was due on the treaty obligation to furnish these objects before the outbreak of the Civil War, and it cannot properly be said that this claim would be

affected by the release covering claims for damages and losses growing out of the war, as pointed out in the lower court's first opinon (Pet. Br. 18).

Respondent's Contention (c).

The respondent would have to show affirmatively that the amount, if any, of said $61,563.42 was expended *gratuitously* for the *benefit* of the *Seminole tribe* as a whole before it is entitled to a gratuity offset under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596.

Item II.

Respondent concedes that it did not comply with the requirements of this treaty but argues that it is excused from such compliance because it is entitled to a set-off for (a) overpayments of $12,127.54 made in 1875, 1877, 1880, 1882, and 1883; (b) payments of $66,422.64 which were made pursuant to requests of the Seminole General Council during the period from 1870 to 1874; and (c) the payments of $62,500.00 made to the United States Indian Agent in 1907, 1908, and 1909 (Res. Br. 25-26).

Respondent's Contention (a).

It will be noticed that the overpayments, totaling $12,127.54, were made during years for which petitioner makes no claim, and therefore these would be immaterial to the issued herein involved. However, we believe that respondent should have credit for these items, provided they were made in accordance with the law governing the disbursement of this treaty money—the Treaty of August 7, 1856 before 1879, and the Act of April 15, 1874 after 1879, when this Act became effective (R. 69).

Respondent's Contention (b).

That the Seminole Council requested that the moneys be turned over to the tribal officials in violation of the treaty requiring them to be paid per capita, and in violation of

Sec. 2097 of the Revised Statutes, would furnish respondent no defense for the reason that these requests were denied by the Commissioner of Indian Affairs and the Secretary of the Interior. That the directions of the Commissioner and Secretary were disobeyed by respondent's disbursing officers clearly would not work out an estoppel against the petitioner. The refusal of these requests was made upon the ground that the executive officers of respondent were not convinced that the proper disposition of the money would be made if turned over to the tribal officials for disbursement (R. 61-62). Thus there is no showing that the tribe ever received the benefit of this money even if the question of benefit were involved. *Creek Nation* v. *United States*, 78 C. Cls. 474, 501; *Seminole Nation* v. *United States*, 82 C. Cls. 135, 149-150.

Nor would these amounts be gratuity offsets under the Act of August 12, 1935 for the reason that the Act expressly states that amounts appropriated and disbursed fom tribal funds shall not be gratuity offsets. Respondent says that because the amounts were appropriated out of the Treasury of the United States to pay this interest due on the Seminole trust funds, this interest is not Seminole money and does not belong to the tribe; and therefore, the exception in the Act of 1935 does not apply. This contention clearly has no merit, for when appropriations were made and the amounts set up to the credit of the Seminole Nation they belonged to said tribe. Before respondent is entitled to a gratuity offset under the Act of 1935 it must show *affirmatively* that these amounts were disbursed for the *benefit* of the tribe. Furthermore, these illegal expenditures were not made from appropriations for gratuity objects, but were made from Seminole trust funds. In other words, there was a misspending of the tribal moneys which resulted in the nonpayment of the treaty obligation. We submit that the Act of 1935 does not contemplate that such illegal disbursements would become gratuity offset claims against an Indian tribe. We discuss this matter fully hereafter at pages 26-28.

Respondent's Contention (c).

Clearly the payment by respondent of the $62,500.00 to the United States Indian Agent for the use of the Seminoles would not denote a payment to the Seminole Nation in accordance with this treaty. By this action the Government merely changed depositories for this money. The respondent admits (Res. Br. 30, footnote 20) that there is no formal finding showing that the money was disbursed during these years in accordance with the treaty, and in the absence of such a finding the respondent is not entitled to this credit. *The United States* v. *Seminole Nation*, 299 U. S. 417. Nor do the efforts of respondent in going beyond the record in this case and setting up extracts from the report of the General Accounting Office (Res. Br., Appendix 64-65), show that these moneys were disbursed per capita in accordance with this treaty provision during the fiscal years 1907 to 1909. To the contrary, this report shows a misspending of these moneys during these years, and furthermore, the figures do not check.

The respondent is not entitled to a gratuity offset in this amount for the reasons above ctated. See discussion pages 26-28 herein.

Item III.

Respondent's Contention (b).

(Res. Br. 32)

The simple answer to respondent's contention is the treaty of March 21, 1866 and Section 2097 of the Revised Statutes. The respondent has shown no statutory authority for paying this money to the Seminole tribal treasurer or in any other manner other than that stated in the treaty.

There is no finding that *this* money actually was disbursed by the tribal officials for schools, even though this were material to the issue. The finding merely is that, "During said period the Seminole Nation disbursed from its treasury not less than the sum of $7,500 per annum for

the maintenance of its schools" (R. 14). In the absence of such a finding the decision cannot be upheld. *United States v. Seminole Nation*, 299 U. S. 417. In petitioner's initial brief we have outlined generally the manner in which the tribal officials were squandering Seminole funds generally (Pet. Br. 26-27).

The manner in which the tribal funds were squandered by the tribal officials for school purposes is set forth in the report of an investigation of the schools, by Frank C. Churchill under direction of the Secretary pursuant to the Act of March 3, 1901, 31 Stat. 1058, 1074. This report, dated March 14, 1902 (H. Doc. No. 522, 57 Cong., 1 Sess., p. 7), showed that the Seminole officials have entire control of the tribal schools. And speaking generally with respect to tribal schools of the Five Civilized Tribes, Churchill states: "I am convinced that their continuance indefinitely with any semblance of tribal control would be against the best interests of the Indian children, as well as a great waste of tribal funds, I must not refrain from stating that, in my judgment, the school funds belonging to the several tribes in the Indian Territory should, as early as possible, be put beyond the reach of tribal officials."

In view of this report the conclusion of the lower court—that it would make "no difference that the payments were made through the agency of the tribal officials"—clearly cannot be supported (R. 26).

The amount due petitioner under this treaty would not be a gratuity offset for the reasons heretofore stated (*supra*, p. 5).

Respondent's Contention (c)

(Res. Br. 33)

The $750.00 paid to the United States Indian Agent in 1907 was not shown to have been disbursed in accordance with this treaty and there is no finding to that effect (R. 13, 14, 26). The question is not one of benefit, but whether the United States complied with its treaty obligation.

Clearly this amount would not be a gratuity offset under the Act of August 12, 1935, for the reasons heretofore stated.

Item IV.

(Res. Br. 33)

We have fully answered this contention in our initial brief.

Item V.

With respect to petitioner's claim for Seminole moneys illegally turned over to the tribal officers in violation of Section 19 of the Curtis Act, the respondent states (Res. Br. 36):

> "To this claim the Government makes the following answer: (a) the payments were properly made to the tribal treasurer; (b) even if the payments to the tribal treasurer were in violation of section 19, the tribe has no standing to complain; and (c) payments made to the tribal treasurer and by him expended for the benefit of the tribe, if not a discharge of the Government's legal obligations, are in any event gratuity offsets allowable under the 1935 act."

Respondent's Contention (a).

Respondent contends that "Section 19 of the Curtis Act prohibits only payments to tribal officers which are 'for disbursement,' *i. e.*, payments to be distributed by them to members of the tribe." (Res. Br. 36). This limitation is of respondent's own creating, for it is not a part of the statute. The complete answer to this contention is found in the first independent clause of the provision stating:

> "That no payment of any moneys *on any account whatever* shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement."

The words "on any account whatever" would negative any such limitation as respondent now suggests.

The history behind this section clearly shows the purpose of this law, and with all of this background before it Congress would not pass a law prohibiting part of Seminole tribal moneys to disbursed by the corrupt tribal officers, and then by the same law entrust them with the disbursement of other of the tribal moneys. Certainly Congress did not do so in enacting Section 19 of the Curtis Act.

The respondent contends that the mere fact that in the legislative process the language of the second clause was altered, denotes that Congress intended to let the corrupt tribal officers disburse part of these Seminole funds. (Res. Br. pp. 37-39). The change was made in the language of the second clause of the section, and by it the language became more general in effect. Clearly this change would not create a limitation of the scope of the section, that would defeat the whole purpose of this section—to prevent the robbery of the members of the tribe by the unscrupulous tribal officers and insure to all members an equal share of said funds. This change was not made in the first clause of Section 19, which clearly prohibits payments *on any account whatever* to the tribal officers *for disbursement*, and as we have pointed out, this clause is entirely independent of the second clause (Pet. Br. 38-39).

The respondent argues that certain quotations from the Choctaw and Chickasaw and the Creek Agreements are in *pari materia* with Section 19, and that like Section 19, they deal only with payments to members of the tribes; and also that the repeal of the provision of the Act of June 7, 1897, c. 3, 30 Stat. 62, 84, permitting the President to veto acts of the council of the Five Civilized Tribes, tends to show that Congress intended to restore to these tribes full control over their tribal funds (Res. Br. 40-41).

We submit that such provisions show a directly opposite intent, for in both the provisions of the agreements cited, the Secretary of the Interior was required to disburse tribal moneys.

Let us point out to the Court that the provision of the Creek Agreement quoted was a part of a tentative Creek

agreement set forth in Section 30 of the Curtis Act. Evidently respondent assumed that said Creek agreement became law upon its ratification by Congress. However, Section 30 required its subsequent adoption by the tribe. As a matter of fact, this agreement never became law for it was never adopted by the tribe (Rept. of Comm. to Five Civ. Tribes, H. Doc. No. 5, 56 Cong., I Sess. (1899) pt. 2, p. 9, Cong. Ser. 3916). A subsequent agreement was executed with the Creeks, and was approved by Congress by Act of March 1, 1901, c. 676, 31 Stat. 861. This agreement was adopted by the tribe on May 25, 1901 (Rept. Comm., Five Civ. Tribes, H. Doc. No. 5, 57 Cong., 1st Sess., pt. 2, p. 45, Cong. Ser. 4291). See Sections 32 and 33 of this agreement governing the disbursement of Creek funds.

The provisions of agreements made with the Five Civilized Tribes vary materially from one another, and we are not concerned here with the provisions of the Choctaw and Chickasaw and Creek Agreements with respect to their funds. Therefore we confine ourselves to the present issue under Section 19 of the Curtis Act in its application to Seminole funds.

The provisions of the Act of June 7, 1897, c. 3, 30 Stat. 62, 84, quoted by respondent (Res. Br. 41) was the first step by Congress to curb the power of the tribal officials of the Five Civilized Tribes over the disbursement of tribal funds. Under it, the President was given the power to veto acts passed by the National councils of these tribes. When Section 19 was enacted, prohibiting payments of any tribal funds to the tribal officers on any account whatever for disbursement, there was no further need for this veto power of the President, and as to the Seminoles, the Act of June 7, 1897 was expressly repealed in the Seminole Agreement. Surely the repeal of this provision would not operate to repeal Section 19 of the Curtis Act; nor would such a repeal support a conclusion that Congress intended to give the tribal officers the full and unrestricted control over Seminole funds they had exercised before Section 19 was en-

acted. It would show a directly opposite intent—to leave Section 19 in full force and effect as to the Seminole Nation.

The respondent further argues that the payments in question were not "for disbursement" to members of the tribe, and that Section 19 did not affect the manner of disbursement of the provisions of the trusts under which the tribal moneys illegally turned over to the tribal officers arose (Res. Br. 42-47).

As respondent points out, the authority of the tribal officers to disburse tribal funds was not granted to them by treaty but was purely statutory. The Act of April 15, 1874, c. 97, 18 Stat. 29, provided that the Treaty of *1856* funds be turned over to the tribal officials for disbursement; and the Act of March 2, 1889, c. 412, 29 Stat. 980, 1004, provided for payment to the tribal treasurer of the interest on a trust fund established by that act. Had not the tribal officers abused this privilege there would have been no need for the passage of Section 19, repealing these provisions and prohibiting these officers thereafter from handling this tribal income. However, the whole purpose behind Section 19 was to put a stop to the abuses of this privilege. We have reviewed this whole matter in our initial brief (Pet. Br. pp. 26-31).

The respondent further contends that "If Section 19, properly construed, applied to all payments to the tribal governments, then it was inconsistent with and has been superseded by subsequent special agreements with each of the Five Tribes." (Res. Br. 47).

This contention was twice decided adversely to respondent by the lower Court (82 C. Cls. 135; R. 28-29). In its last decision the lower court said (R. 28-29):

> "We reaffirm our former opinion in this case to the effect that section 19 was intended to apply to the plaintiff. The Secretary of the Interior in making the payments to the tribal treasurer was acting under the authority of an opinion of the Assistant Comptroller of the Treasury. In that opinion the Comptroller held that the Seminole agreement ratified July 1, 1898 (30

Stat. 567), providing as it did for the continuation of existing treaties between the Seminoles and the United States, made section 19 of the Curtis Act inapplicable to the Seminole Nation. He was of the opinion that under these treaties the Secretary of the Interior was authorized to pay funds due the tribe into the tribal treasury; but, as we held in our former opinion, the authority to pay these funds to the tribal treasurer was derived not from a treaty but from the act of April 15, 1874 (18 Stat. 29), which authorized such a disbursement, provided the Council of the tribe agreed thereto. We do not think that the Seminole agreement providing for the continuation of existing treaties had in contemplation an agreement entered into under this Act. It is hardly conceivable that on June 28, 1898, Congress should have passed an Act prohibiting the making of certain payments to the tribal treasurers of all the Five Civilized Tribes, which included the Seminole Nation, and three days later should have passed an Act repealing this provision as to the Seminoles. We are of opinion that the prohibition of the Curtis Act applied to the Seminoles."

The respondent accepted this last decision and filed no cross-petition properly raising the question now presented, and clearly it has now waived the right to attack this conclusion of the lower court. Had respondent properly raised this question, the record would have been prepared properly to present the facts with respect to this whole matter.

The sole question now before this Court is whether Section 19 was misconstrued by the lower court, and whether by such misconstruction the purpose and effect of the section was lost.

However that may be, let us briefly review this matter for the Court.

Respondent says (Res. Br. 49), "If Section 19 be construed as prohibiting all payments to the tribal officers, including the payment of the expenses of maintaining and conducting the tribal governments (as distinguished from payments for disbursement to members of the tribe), then the section is plainly inconsistent with the Seminole agreement."

Respondent further argues that the Seminole agreement contemplated that the Seminole government would continue to exist until the affairs of the tribe were concluded (Res. Br. 49).

We believe that the fallacy in this argument lies in the fact that it presumes that the continuance of the tribal government would depend wholly upon the disbursement of the tribal funds by the corrupt tribal officials. It is evident that the Seminole government could continue even though the necessary disbursement of the Seminole moneys for this purpose were made by the Secretary of the Interior, who could have insured the proper disbursement of these funds. There is no provision in the Seminole Agreement authorizing the Seminole officials to disburse Seminole tribal funds for this purpose, but thereunder the Secretary of the Interior is required to disburse them—a manner wholly *consistent* with Section 19.

As heretofore pointed out the sole right of the Seminole officials to disburse Seminole moneys was not created by treaty, but was merely statutory, and was repealed by Section 19 of the Curtis Act.

In *Creek Nation* v. *United States*, 78 C. Cls. 474, (a final decision), the Government took the position that under Section 19 of the Curtis Act and the Creek Agreement the Secretary of the Interior was authorized to make payments for the continuance of the tribal government, a position directly opposite to the one now advanced. After reviewing Section 19 of the Curtis Act, the Original Creek Agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, and the Act of April 26, 1906, c. 1876, 34 Stat. 137, the Court therein said (p. 487-490):

> "* * * The authority to disburse the tribal funds and all moneys coming to the tribe under the provisions of the three Acts was lodged solely in the Secretary of the Interior.
>
> * * * * * * * * * *
>
> Section 19 of the Curtis Act changed only the manner in which the Creek tribal funds were to be disbursed.

Neither that section nor any other provision of the act defines or limits in any way the purposes for which the tribal funds might be expended. These funds were no longer paid into the Creek National Treasury by the United States for the purpose of disbursement by the tribal authorities but were retained in the Treasury of the United States to the credit of the tribe, and were disbursed by the Secretary of the Interior. The disbursements complained of were largely for purposes identical with those for which the funds had been expended during the preceding years by the tribal authorities. Congress undoubtedly contemplated and intended that the tribal funds would continue to be expended in the future, as they had been in the past, for the benefit of the Creek Nation and its people. Consequently, we think that when Congress, by the provisions of section 19 of the Curtis Act, took away from the Creek tribal authorities the control which they had formerly exercised over the disbursement of their tribal funds and charged the Secretary of the Interior with the duty of disbursing the funds, without defining or limiting the purposes for which they might be expended, it by clear and necessary implication invested him with authority to disburse and expend the funds in such manner and for such purposes as would, in his judgment, satisfy the needs of the Creek Nation and promote the welfare and happiness of its citizens, subject to such limitations as Congress might subsequently impose."

By this argument in that case the respondent defeated a large portion of the claim of the Creek Nation. Now it seeks to reverse its position in this case to defeat this claim of the Seminoles.

Thus, under the holding in the Creek case the Secretary could have disbursed Seminole funds for the continuance of the Seminole Government. Had the Secretary disbursed Seminole funds as he did the Creek funds, he would have implicitly complied with Section 19 and the Seminole agreement. Furthermore, he would have properly applied the Seminole funds to the purposes that would best benefit the Nation as a whole, and the Seminole officials would not have

been permitted further to squander the tribal income and reap the benefit of these funds for themselves. This protection was all the other members of the Seminole Nation requested in their protests.

Under the Curtis Act and the Seminole agreement the United States took over substantially all of the functions of the Seminole government, and its continuance should have entailed a minimum of expense to the tribe. To extinguish the tribal governments and individualize the tribal holdings was the whole purpose of this new Governmental policy with respect to the Five Civilized Tribes.

Clearly there is no inconsistency between Section 19 and the Seminole Agreement as the manner of disbursement is the same in both provisions—that the Secretary of the Interior disburse Seminole funds.

The respondent further contends that "The inapplicability of Section 19 to the payments in question is supported by the administrative construction, which in turn has been implicitly approved by Congress" (Res. Br. 50).

Let us review briefly for the court just what happened with respect to these opinions.

In its report of October 3, 1898 the Dawes Commission states in part as follows (H. Doc. No. 5, 55th Cong., 3 Sess., p. cxliv, Cong. Ser. 3756):

> "* * * The knowledge of the preparation of this bill [Curtis Act] aroused great opposition of those in the Territory opposed to any change in the existing use of tribal property by the few controlling the government of the Territory. Accordingly large delegations were sent to Washington, at great expense to their National treasuries, for the purpose of preventing such legislation and procuring, if possible, the repeal of the law taking away so much of their political power, which was to take effect January 1, 1898. * * *"

No sooner had the Curtis Act been passed, than the Brown brothers, Seminole Principal Chief and Treasurer, who were in Washington opposing this legislation, and their attorney, Samuel J. Crawford, raised the question as to whether Sec-

tion 19 applied to the Seminole Nation, in an endeavor to secure an administrative construction that would permit them to retain control of these Seminole funds.

The Secretary of the Interior referred the question to Assistant Attorney General for the Interior Department, Willis Vandevanter, later Mr. Justice Vandevanter of this Court, who then occupied a position now held by the present Solicitor for the Interior Department. Assistant Attorney General Vandevanter perforce came into contact with the members of the Dawes Commission, with the representatives of the various tribes, and with everyone interested in drafting and discussing the laws which would prevent the then existing abuses in the Indian Territory. He saw every angle of this whole problem; he knew the history of the abuses and the purposes and intent of both executives and legislators to correct them; and he understood thoroughly every step taken for the solution of this problem. He lived all of it and had before him vividly and accurately then, what now appears to us but dimly through the many years that have since elapsed. With all of this light before him Assistant Attorney General Vandevanter held that Section 19 applied to the Seminole Nation and that the manner of disbursement under the Seminole agreement was the same. This opinion is printed in full in the appendix to respondent's brief, pp. 33-37, and a review of it shows clearly that there is no inconsistency between Section 19 and the Seminole Agreement.

We have seen that the very thieves at whom Section 19 was aimed had been present in Washington to oppose it. Thunderstruck at the Vandevanter opinion, they had it withdrawn, and transferred to the Comptroller for decision. Although this decision was withdrawn because it was not conclusive (Res. Br., Appendix 38), yet it was never repudiated. While Assistant Attorney General Vandevanter prepared the letter for submission to the Comptroller, as pointed out by respondent, yet he did not argue *personally* for the views set forth therein, as respondent seems to sug-

gest (Res. Br., 53). He merely presented the views advanced by the corrupt Seminole officials and their counsel, as will readily be seen from that portion of his letter incorporated in the erroneous Comptroller's decision of August 23, 1898 (Res. Br., Appendix 39-54). As Assistant Attorney General Vandevanter states: "the Seminole tribe insist", "the tribe contends", and then he sets out contentions now advanced by respondent. Then followed the erroneous Comptroller's decision of August 23, 1898. Thereafter, the Secretary followed the erroneous Comptroller's decision, and disbursed these moneys in violation of Section 19.

The lower court pointed out the fallacies in the reasoning of the Comptroller—that the right of the tribal officials to disburse tribal funds was not provided by treaty, but was statutory—and held that the Vandevanter opinion properly sets forth the correct decision of the legal question presented.

Let us briefly review for the Court just what happened with respect to these decisions and bring the narrative down to an unbelievable conclusion. Disregarding the Vandevanter opinion, the Secretary refused to disburse Seminole funds himself, and turned them over to Brown et al., until the fiscal year 1907, when the Act of April 26, 1906, c. 1876, 34 Stat. 137, became effective.

The Act of April 26, 1906 was a general law applying to all of the Five Civilized Tribes, as was the Curtis Act, and under it the Secretary of the Interior was given control over the tribal schools and the right to pay certain claims. The question arose under this Act whether the Seminole officials or the Secretary of the Interior could control the disbursement of Seminole funds, and the Secretary referred it to the Comptroller for decision.

The Comptroller replied referring to and reaffirming his decision of August 23, 1898, which overruled the Vandevanter opinion, and followed the same reasoning and quoted this earlier decision, holding that a part of the funds should be turned over to Brown, et al., but that the Act of 1906, be-

ing so specific, required that the Secretary disburse a part of these funds for certain specific purposes (Res. Br., Appendix, 55-58, quotes part of this decision).

Dissatisfied with "half a loaf," and reversing the order of their former proceeding of having the question referred from the Assistant Attorney General to the Comptroller, the Browns and Crawford now had the question referred from the Comptroller to the Attorney General. They attacked the constitutionality of the Act of 1906. Passing upon all the questions involved, the Attorney General held that none of the Seminole funds were to be turned over to Brown, et al., but that all of these funds were to be disbursed by the Secretary (26 Op. Atty. Gen'l. 340). Thenceforth the Secretary disregarded the Comptroller's decision, and followed the Attorney General's opinion, disbursing all of these funds himself, and our cause of action upon this claim ceased.

Let us call attention to the fact that in this last decision, while another and later act had entered into the matter, the Comptroller followed exactly the same reasoning he used in overruling the Vandevanter opinion—in fact, he quoted that former decision and made it a part of his later one. While Attorney General Bonaparte does not mention Section 19 or pass upon the effect of it, for a later statute is involved, his line of reasoning is very much the same as that used by Assistant Attorney General Vandevanter.

From what we have thus before us, two things strike us most forcibly: first that the Comptroller could not have been right the first time and Assistant Attorney General Vandevanter wrong, if the Comptroller was wrong the second time and Attorney General Bonaparte right; and second, that the Secretary could not have felt forced to follow the Comptroller's decision the first time, when he refused to follow it the second time.

The respondent suggests that the administrative construction of Section 19, as set forth in the erroneous Comptroller's decision of August 23, 1898, is entitled to great weight. But we have pointed out that there are decisions from re-

spondent's administrative officers on both sides of the question. From the above we have seen that the administrative construction of Section 19 was inconsistent and not consistent as defendant would lead the Court to believe.

With respect to Creek funds there was a Comptroller's decision, dated August 30, 1898, holding that after the ratification of the Creek Agreement, Section 19 of the Curtis Act was inapplicable (5 Comp. Dec. 93). However, the Secretary disregarded this decision and disbursed Creek moneys under Section 19 (*Creek Nation* v. *United States*, 78 C. Cls. 474). In the case at bar he disregarded the Vandeventer opinion and followed the Comptroller's decision. As the Secretary disregarded the decision of the Comptroller in the Creek case, the mere fact that he followed a decision of that officer in the Seminole case would not clothe the latter decision with greater dignity, nor could such action affect the question before us upon its legal merits. In other words, it cannot be said that the Comptroller's decision in this case is a defense for the Secretary's action, because he disregarded administrative decisions at will—disregarding one with respect to Creek tribal funds, and following one and disregarding another with respect to Seminole tribal funds as to the effect of Section 19.

Under the circumstances enumerated above, respondent cannot successfully contend that the Court should apply the rule of administrative construction. We believe that this rule has no application to the situation before us. In *Houghton* v. *Payne*, 194 U. S. 88, 99, this Court stated as follows:

> "* * * it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. United States v. Graham, 110 U. S. 219; United States v. Finnel, 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the court as to the original correctness of such construction. A custom of the

department, however long continued by successive officers, must yield to the positive language of the statute. As was said in the Graham case (p. 221), 'if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with the language clear and precise, and with its meaning evident; there is no room for construction and consequently no need of anything to give it aid. The cases to this effect are numerous'."

The language of Section 19 is clear, its intent is plainly evident from its history, and we submit that the Secretary should have followed it.

The respondent suggests (Res. Br. 56) that Congress impliedly ratified the action of the Secretary of the Interior in violating the plain language of Section 19, by continuing to make appropriations for the payment of interest on Seminole trust funds after the Secretary's action had been reported to it. The reports relied upon by respondent were statements made to the Commissioner of Indian Affairs, and not to Congress, which were later included in the annual reports of the Secretary to Congress. There is no showing that Congress ever had them under consideration, or acted to adopt the Comptroller's erroneous construction of Section 19, or otherwise evidenced an intention to change in any manner the directions set forth in Section 19.

The fact that Congress continued to make appropriations to fulfill its obligations to pay interest on Seminole trust funds clearly would lend no support to respondent's present contention.

Congress, having acted specifically to protect Seminole funds by the passage of Section 19, delegated to the Secretary of the Interior and the administrative officers under him the duty to disburse these Seminole funds, and while this provision was in force and effect the Secretary was duty bound strictly to comply with it.

Respondent's Contention (b).

The respondent contends that if the payment of the $864,702.58 to the tribal treasurer was in violation of Section 19 of the Curtis Act, the petitioner has no standing to complain (Res. Br. 57).

Under this general contention respondent says that Section 19 gave no right of action to the Seminole Nation because it was merely a direction to the fiscal officers of the United States, which Congress could change at will (Res. Br. 57). In support of this contention it cites the *Sac and Fox* case, 220 U. S. 481.

We submit that respondent's interpretation of this decision fails to recognize (1) that the Seminole *tribe* is party plaintiff in the case at bar, and is suing for *tribal* income due the tribe under treaties; whereas, in the *Sac and Fox* case the party plaintiff was a band of individuals who had severed their connection with the tribe, claiming the right to sue for tribal annuities by virtue of the Act of 1852, which was not intended to give these individual Indians any right to sue for annuities due under contracts with the tribes; (2) That Section 19 of the Curtis Act was intended to change the former manner of disbursing the moneys due the Seminole Nation, whereas the Act of 1852 referred to in the *Sac and Fox* case did not change the manner of disbursing the annuities due under the treaties with the tribe; (3) That no question of violation by the Secretary of the Interior of the Act of 1852 was involved; as is involved in the case at bar.

Had the Sac & Fox tribe sued the United States for a failure to pay its annuities in accordance with the plain directions of Congress in the Act of 1852, we would have had a somewhat analogous case to the one at bar, provided Congress had intended to change the treaties in this respect. However, individual Indians forming a band, wholly unconnected with the tribe, and claiming annuities promised to the tribe by treaties, and claiming a right to sue for a part of the tribal annuities by virtue of said Act of 1852, clearly would not transform the Act of 1852 into one creating a new

right in individuals—not connected with the tribe—to sue the United States for annuities due the tribe under treaties made with the tribe. This is all this case held, and we think the decision was correct. As this Court clearly pointed out, "The Government did not deal with individuals but with tribes. * * * The promises in the treaties under which the annuities were due were promises to the tribes."

In the case at bar the Seminole Nation is party plaintiff and in suing for the failure of the Secretary of the Interior to follow the plain provisions of Section 19, which was passed for the sole purpose of preventing the robbery of the tribal income by the unscrupulous tribal officers, and insuring to the tribe the proper distribution and benefit of its tribal income due under treaties and agreements made with the tribe: This money was not paid to the tribe, but continued to be paid over to these corrupt tribal officers, and the tribe got no benefit therefrom. Had the individual Seminoles filed suit, claiming their share of the tribal annuities due the tribe under treaties on the theory that Section 19 gave them an individual vested right in tribal annuities, the suit would be somewhat analogous to the one brought by the band of Sac & Fox Indians, and clearly that decision would apply in such a case. But the case at bar is not such a case. Clearly there is no merit to this contention of respondent.

The respondent further contends (Res. Br. 63) that the petitioner having requested that the tribal moneys be turned over to the tribal officers is now estopped to receive payment a second time.

If the Seminole officials constituted the Seminole Nation and all the tribal income was to be disbursed solely for their benefit then the respondent would be correct in its contention. But Congress decided that the other members of the tribe were entitled to an equal share of the tribal income along with the tribal officers, and Section 19 was specially enacted to insure to all members of the tribe an equal share of the tribal moneys.

While it is true that the lower court found that "These moneys were paid to the tribal treasurer at the request of

the counsel of plaintiff, but over the protest of some of the individual members of the tribe," yet the sole citation of respondent in its brief (C. Cls. Br. p. 158), in support of this finding was a reference to the Comptroller's erroneous decision of August 23, 1898, in which it is stated that "The Seminole tribe insist that all of said money can be, and should be, paid as heretofore, into the tribal treasury, to be applied and expended according to the laws of the tribe." (Res. Br., Appendix 49.) This statement clearly does not support the finding by the lower court that the payments were made "at the request of the council of plaintiff." However, that may be, we submit that even if such an act were passed by the Seminole council, it would not have the effect of overriding an act passed by Congress within its plenary power over Indian affairs.

All efforts to prevent the application of Section 19 to Seminole moneys were made by the unscrupulous tribal officers, and not by the tribe. These efforts of the tribal officers could not bind the tribe, for under Section 19 they ceased to be representatives of the tribe in matters concerning the disbursement of the tribal income. In fact, the tribe, as best it could, protested the manner in which these officers were using Seminole funds. In the protest of January, 1898 (Sen. Doc. 105, 55th Cong., 2nd Sess., pp. 3, 4), the Seminoles stated:

> "The national funds of the Seminoles are absorbed by only a few of their citizens who have grown rich at the public expense, and we firmly believe that these few persons are oppressing the poorer ones. * * *
>
> * * * * * * * * * *
>
> "We beg leave to state further that we have no law regulating the bond of our treasurer or chief, and according to the Seminole law no action or bill can be placed before the council without the consent of the chief. Our laws do not admit of an auditor, and our people are entirely ignorant of the condition of our finances. Therefore, in conclusion, we desire to say that while the legislation has not been in line with our wishes, we must perforce of circumstances accept the

> inevitable. We ask that any disposition of moneys belonging to the Seminoles and the management of their schools be made with the approval of the Secretary of the Interior. * * *"

Another protest of the Seminoles forms a part of the record (R. 64).

The doctrine of estoppel is salutary and is applied to prevent fraud and not to cover it; and under the circumstances in this case defendant could not use it as an excuse for its plain violation of the wholesome provisions of Section 19, and in aiding the continuation of the dissipation of Seminole funds by the officers of this tribe:

In the face of the positive provision of Section 19 forbidding the payment of Seminole tribal funds to the Seminole tribal treasurer, and the whole history behind it, defendant cannot say that it lacked knowledge of the facts, or was misled by the act of the plaintiff tribe. It is a well established principal of law that:

> "As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conduct or representations of the party sought to be estopped, it is a general rule essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have also been without convenient or ready means of acquiring such knowledge. One relying on an estoppel must have exercised such reasonable diligence as the circumstances of the case require. If he conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss he cannot invoke the doctrine of estoppel." 21 C. J. 1129-30.

The respondent had before it, at the time it decided to turn these Seminole moneys over to the Seminole tribal officials, the protests of the members of the tribe, and also the various reports of the manner in which the tribal officials were disbursing these funds; it knew it was dealing

with these tribal officers, the very ones against whom Section 19 was aimed. Therefore, respondent cannot now claim that petitioner is estoppel to assert its claim, and use this principal as an excuse for its plain violation of Section 19.

The question now before us is not a payment a second time, but the proper payment a first time. By failing to follow the plain directions of Congress, as expressed in Section 19, the Secretary paid the Seminole income to persons not authorized to receive it on behalf of the tribe, and we submit that the United States is now liable to the rightful owner of these funds.

The respondent states that the record fails to show that the failure of the Secretary to follow Section 19 resulted in actual damage to the tribe (Res. Br. 63).

In our initial brief we have reviewed the manner in which Seminole funds were disbursed by the tribal officers to show the Court that these officers alone benefited (Pet. Br. 29-36). We have set forth the protests of the Seminoles themselves showing that their officials were amassing large fortunes at the expense of the other members of the tribe, that the national funds were completely absorbed by the few officials (*supra*, 23-24), and that the Indians never received the moneys appropriated for them.

Certainly we have shown damage resulting from the failure of respondent to comply with Section 19, which permitted this condition to continue to exist after Congress in positive language forbade payments to these corrupt tribal officials. We submit that we have made out a claim against respondent.

Under these circumstances, we submit that the tribal books are entitled to little weight; they are self-serving, and nobody had anything to do with them but the officials. In 10 Ruling Case Law, Par. 372, p. 1174, it is stated that:

> "It has been said that books of account are received in evidence only upon the presumption that no other proof exists. They are justly regarded as the weakest

> and most suspicious kind of evidence. The admission of them at all is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself make evidence in his own favor."

The wrong complained of would not be shown by the books prepared by the corrupt tribal officials.

We submit that after Section 19 was passed payment to the tribal officials was not payment to the tribe, and the respondent is liable to the tribe, the rightful owner of the funds. *Burnell* v. *United States*, 44 C. Cls. 535, 548 (Pet. Br. 39-40). Furthermore, to hold that the Secretary had the legal right to expend tribal funds in a manner positively prohibited by Congress would be equivalent to holding "that the Secretary of the Interior, not Congress, had full administrative control and power over the property of the plaintiff tribe." *Creek Nation* v. *United States*, 78 C. Cls. 474, 491.

Respondent's Contention (c).

The respondent finally contends that "If it be held that the payments made to the tribal treasurer did not discharge the Government's legal obligations to the tribe, it seems clear that these payments, since they were made at the tribe's request and for its benefit, are gratuity offsets under the 1935 act" (Res. Br. 64).

Here again respondent *assumes* that the moneys were properly paid to the tribe, and that the tribe received the benefit of it. This contention also overlooks that plain proviso in the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which reads as follows:

> "That funds appropriated and expended from tribal funds shall not be construed as gratuities."

The Conference Report on the above bill (H. Rep. No. 1715, 74th Cong., 1 Sess., p. 8) states the intention of Congress in making this exception as follows:

> "Expenditures from tribal funds are not to be considered as gratuity expenditures."

When this gratuity matter was before the Senate, and in Conference, as attorneys for several of these Five Civilized Tribes whose rights were greatly affected, we were requested to submit to Senator Hayden, who had charge of this matter, a substitute provision for the one passed by the House. We included in our substitute provision the above exception, having in mind just such a situation as is presented in this case. In our memorandum accompanying the substitute provision, we stated as follows:

> "Also certain errors were made by the United States in the handling of certain treaty annuities, trust funds and other property of the Indians, and recovery is sought by the Indians because of these dissipations of their property. It would be most unfair for the Government to take advantage of its own errors by permitting it to off-set such amounts as gratuities to defeat legitimate claims of the Indians."

Evidently this memorandum was before the Conference Committee when this exception was placed in the Act of 1935. By this exception defendant is prevented from taking advantage of its own illegal action to defeat the just claims of the Indians. In other words, without this exception respondent could use its own illegal action as ground for an affirmative gratuity offset claim against the legal and equitable claims of an Indian tribe.

These illegal expenditures were not made from appropriations for gratuity purposes, but were Seminole trust funds. In other words, the respondent failed to comply with a specific direction of Congress as to the manner in which these *tribal funds* were to be disbursed. And clearly the Act of 1935 does not contemplate that such illegal disbursements would become gratuity offsets against an Indian tribe.

Even if tribal funds were not expressly excluded as gratuities from the Act of 1935, yet respondent would have to prove affirmatively that the amounts were expended *gratuitously* and for the *benefit* of the *tribe*, before it would be

entitled to a gratuity offset. This respondent has failed to do.

We submit that there is no merit to this contention of respondent.

These illegal expenditures were not made from appropriations for gratuity purposes, but were Seminole trust funds. In other words, the respondent failed to comply with a specific directions of Congress as to the manner in which these *tribal funds* were to be disbursed. And clearly the Act of 1935 does not contemplate that such illegal disbursements would become gratuity offsets against an Indian tribe.

GRATUITY OFFSETS.

Item VI.

The respondent states that petitioner apparently does not challenge the lower court's decision with respect to certain items of gratuity offset (Res. Br. 65-66).

The petitioner here challenges all gratuity offsets not conceded, upon the general ground that the lower court threw upon it the burden of proving that the respondent was not entitled to a gratuity offset, instead of requiring of respondent affirmative proof that the items claimed were gratuity offsets (Specification of errors, No. 1, Pet. Br. p. 11). The petitioner conceded in the lower court the item of $31,083.79 (Finding 9, R. 16). No other items were conceded, though petitioner pointed out to the lower court that they might possibly be gratuity offsets, and that before respondent was entitled to them the burden was on it to prove that they were gratuity offsets. (Plaintiff's Reply Br., C. Cls., pp. 256, 266, 272.)

Item VII.

As originally passed the jurisdictional acts of the Five Civilized tribes did not provide for gratuity offsets against these tribes. The Act of May 20, 1924, c. 162, 43 Stat. 133,

originally authorizing this suit provided a legal forum whereby the Seminole Nation might have a determination of its legal and equitable claims, and the United States was authorized to present its claim against the tribe.

There was a reason for this distinction between the Five Civilized Tribes and what are termed the "wild tribes." The Five Civilized Tribes did not receive large sums of money from the Government for their support. Their income was derived from the proceeds of the sales of their lands to the Government, which were deposited in the Treasury to the credit of these tribes, and provided an annual income to them. Being advanced in civilization, generally speaking these tribes were given the right to administer their own affairs, including the control over the disbursement of their tribal income.

The "wild tribes" had great areas of land but little annual income, and many of them were wholly dependent upon the Government for support. While on the one hand there were few *gratuity* payments made to the Five Civilized Tribes, yet large amounts were disbursed for the support of the "wild tribes."

This distinction has always been recognized by those familiar with Indian affairs, and it was recognized by Congress when it considered the jurisdictional acts of the Five Civilized Tribes, and for that reason no provision for gratuity offsets was placed in the acts of the Five Civilized Tribes. While in the other "wild tribes" acts it was the custom to insert provisions for such gratuity offsets.

In 1935, the House Committee on Appropriations inserted in the middle of the Second Deficiency bill, a provision to make gratuity offsets applicable to Indian claims generally, without knowledge of the Chairman of the House Indian Affairs Committee, the Interior Department, or plaintiffs whose rights were greatly affected. Under a "gag" rule the bill was rushed through the House, and no objection could be made to the provision as being new legislation on an appropriation bill.

When the bill reached the Senate, considerable opposition arose to the provision, and the manner in which it was passed by the House, and the provision was struck out *in toto*.

The matter went to conference and resulted in the compromise provision which became the Act of August 12, 1935. Even though this provision was made to apply to the Five Civilized Tribes, yet we felt that under a proper construction of the act, in the light of the obligations of the United States assumed in treaties and agreements, and in carrying out its policies toward these Five Civilized Tribes, the courts would recognize the distinction between the obligations of the United States to these tribes and the "wild tribes."

However, we believe that the failurg of the lower court to recoguize this distinction has led to the errors made by it with respect to the gratuity allowances in this case.

We have pointed out to the Court that most of the gratuity allowances made by the lower court were for administrative expenses in carrying out the obligations of the Government under its treaties and agreements with the Seminole Nation, and in furthering its general policy toward the Five Civilized Tribes.

The respondent is in error in suggesting that the principle stated in the *Osage* case, 66 C. Cls. 64, 82, was later repudiated by the lower court (Res. Br. 98). While it is true that the lower court reversed its stand on the education of individual Indians at nonagency schools on the ground that this benefited the tribe as a whole, yet it has not repudiated the principle that disbursements for individuals, as contrasted with those beneficial to the tribe as a whole, are not gratuity offsets against the tribe. In fact, the Act of 1935 requires the gratuity to be disbursed for the benefit of the *tribe* as a whole before it is to be allowed as an offset against a *tribal* claim.

We thought respondent would concede that the amount of $62,999.16 charged against the Seminole Nation for the expenses of maintaining the Cherokee Orphans Training School, when it was shown that not a Seminole Indian was

in attendance at the School, and that the Seminole Nation maintained a school for its orphan children from tribal funds. But petitioner insists that it is entitled to this offset on some theoretical benefit the Seminole Nation might receive from the fact that the school was established for all of the Five Civilized Tribes (Res. Br. p. 97). We submit that the Act of 1935 requires the respondent to prove actual benefit to the Seminole Nation before it is entitled to a gratuity offset.

We have carefully outlined our other views in our initial brief and we need not reiterate them here.

As these erroneous allowances now stand as a charge against the Seminole Nation we earnestly request the Court to settle the issues with respect to them.

Finding 10.

The respondent contends that the lower court erred in holding that it was entitled to a gratuity offset for the $165,847.17 disbursed for 175,000 acres of Creek lands for the use of the Seminoles, and that it is entitled to a total of $175,000.00 as a gratuity offset (Res. Br. 72, 75). The petitioner contends that the lower court erred in the allowance of any amount thus disbursed as a gratuity offset, for this item was purely an element of reparation for errors made by the Government. As set forth in petitioner's brief in case No. 830, pages 27-28, the view advanced by the respondent was rejected by Congress when the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, was before Congress for consideration.

The view expressed by the Commissioner of Indian Affairs, H. Price, in his letter to the Secretary of the Interior, dated January 9, 1882, that the Seminoles be required to release lands on the west side of their domain in lieu of the 175,000 acres added to their domain (set forth in footnote 49 of respondent's brief, pp. 77, 78; Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 2), was rejected by Congress; and the view expressed by Acting Commissioner of Indian Affairs, Thomas M. Nichol, in his letter to the Secretary,

dated February 18, 1881, that the Seminoles should not be charged with this expense as the error was made by the Government (Pet. Br. pp. 45, 46; Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 7, Cong. Ser. 1989), was accepted by Congress.

Therefore Congress determined that this item was a matter of reparation to the Seminoles, and in the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, provided that payment be made out of public funds. We submit that this determination of Congress with all of the facts before—including the two views above set forth—would finally settle the matter.

We have thoroughly discussed this item in our brief in case No. 830, this Term, and also in our reply brief in that case, and we respectfully refer the Court to our views set forth therein.

Respectfully submitted,

PAUL M. NIEBELL,
C. MAURICE WEIDEMEYER,
W. W. PRYOR,
Attorneys for Petitioner.